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S SANTHI v. DEIVIGARANI KRISHNA; MAJLIS PEGUAM MALAYSIA (INTERVENER)

HIGH COURT MALAYA, KUALA LUMPUR
ASMABI MOHAMAD J
[ORIGINATING SUMMONS NO: 17D-7-04-2015]
9 SEPTEMBER 2016

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LEGAL PROFESSION: *Professional discipline – Unbecoming act of advocate and solicitor – Appeal against decision of Disciplinary Board – Advocate and solicitor came to complainant's house on Friday night to serve cause papers during family congregation – Advocate and solicitor introduced herself loudly in front of complainant's family members – Whether advocate and solicitor carried out duty in way that would cause anxiety and emotional distress to complainant – Whether there was urgency for cause papers to be served – Whether hours reasonable – Practice Note No. 1 of 1968*

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CIVIL PROCEDURE: *Service – Service of cause papers – Reasonableness – Advocate and solicitor came to complainant's house on Friday night to serve cause papers – Whether service would be deemed to be next day service – Whether there was plausible explanation – Whether there was urgency for cause papers to be served – Whether hours reasonable – Rules of Court 2012, O. 62 r. 8*

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The plaintiff, an advocate and solicitor, represented her client in an application for the legal guardianship of an unborn child which was filed at the High Court with a certificate of urgency. The originating summons ('the OS') was extracted by the plaintiff on 29 March 2013 with a return date stated as 3 April 2013. The defendant complained to the Advocates and Solicitors Disciplinary Board ('the DB') that the plaintiff (i) came to her house on 29 March 2013, at about 8.45pm, on the eve of her sister's wedding to serve the OS on the defendant; (ii) introduced herself as a lawyer in a loud voice; and (iii) wanted to embarrass the defendant in front of her family. A Disciplinary Committee ('the DC') found that the plaintiff (i) was aware of the pre-wedding ceremony since her client informed her about it; (ii) served the documents on a Friday night despite being fully-aware that service of court documents after 4pm was deemed next day service and in which case, it would be considered served on Monday; (iii) caused embarrassment to the defendant; (iv) was aware that the defendant was in her advanced stage of pregnancy and the manner in which she carried out her duty would cause anxiety and emotional distress to the defendant and her family; and (v) carried herself in an unpleasant manner during the hearing and had shouted at the defendant to 'shut up' with a few outbursts even though the defendant was calm. Acting upon the recommendation of the DC, the DB imposed a penalty of RM5,000 on the plaintiff, which was to be paid within

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one month, failing which the plaintiff shall be suspended from practising as an advocate and solicitor until the penalty has been paid. Dissatisfied, the plaintiff filed the present OS to appeal against the decision of the DB.

Held (dismissing originating summons):

(1) There was no reason to disturb the finding of facts made by the DC since the plaintiff failed to demonstrate that those findings were perverse and unwarranted on the totality of the evidence before the DC. The DC had the benefit to observe the demeanour and heard the witnesses before coming to its conclusion. (para 12)

(2) Order 62 r. 8 of the Rules of Court 2012 states that 'any document ... service … after twelve noon on a day preceding the weekly holiday or after four in the afternoon on any other weekdays, shall ... be deemed to have been served on the day following that day preceding the weekly holiday or on the day following that other weekday, as the case may be'. Furthermore, Practice Note No. 1 of 1968, on substituted service, requires service attempts to be made on weekdays and at reasonable hours. (paras 13 & 14)

(3) There was no plausible explanation for the plaintiff to effect the service of the cause papers at approximately 8.45pm on a Friday, since the service would be deemed to be done on Monday. It was unbecoming for the plaintiff to serve the cause papers on a Friday night, with the knowledge that, that was the eve of the wedding of the defendant's sister and the defendant would be surrounded with family members and friends. The return date stated in the OS was merely a case management date, as could be seen from the endorsement of the OS. There was no urgency for the plaintiff to serve the cause papers and the plaintiff could even obtain another date if she could not serve the papers within time. (paras 15 & 16)

Case(s) referred to:

Bar Malaysia v. Mohd Fadli Shuib & Anor [2014] 1 LNS 1934 CA ***(refd)***
Bar Malaysia v. Neasarani T Singara Thevar & Anor [2015] 8 CLJ 634 CA ***(refd)***
Gana Muthusamy v. Tetuan LM Ong & Co [1998] 4 CLJ 878 CA ***(refd)***
Keith Sellar v. Lee Kwang [1980] 1 LNS 36 FC ***(refd)***
Rajehgopal Velu v. Ganashalingam Rajah; Majlis Peguam Malaysia (Intervener) [2015] 8 CLJ 1202 CA ***(refd)***
Trikkon Sdn Bhd v. Mahinder Singh Dulku [2010] 5 CLJ 850 HC ***(refd)***

Legislation referred to:

Legal Profession Act 1976, s. 103E(6)
Legal Profession (Practice and Etiquette) Rules 1978, r. 32
Rules of Court 2012, O. 62 r. 8

For the plaintiff - S Shanti; M/s San & Co
For the defendant - M Manogaran; M/s Manogar & Co
For the intervener - Avinder Sing Gill; M/s AS Gill & Salina

Reported by Najib Tamby

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JUDGMENT

Asmabi Mohamad J:

Introduction

[1] By an originating summons dated 9 April 2015 ("OS"), the plaintiff
B appealed against the decision of the Disciplinary Board ("DB") given on 12 March 2015 wherein the DB had affirmed the disciplinary committee's ("DC") findings on liability and ordered the plaintiff to pay a fine of RM5,000 to the disciplinary fund within one month from the date of the order and in default, the plaintiff be suspended from practice as an advocate
C and solicitor of the High Court of Malaya until the payment of the fine into the said fund had been satisfied (see exh. "SS1" of encl. 2).

[2] The plaintiff had also prayed for costs of this appeal to be borne by the defendant and other reliefs this court deems fit.

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The Documents

[3] For the purpose of this OS, the following documents were filed and referred to by the court:

(a) Affidavit in support affirmed by the plaintiff on 9 April 2015 ("encl. 2");

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(b) Affidavit in reply by the defendant affirmed on 11 May 2015 ("encl. 6");

(c) Supplementary affidavit by the plaintiff enclosing the certified true copy of the bundle of document by the Director of Complaints Secretariat,
F affirmed on 14 May 2015 ("encl. 8");

(d) Additional affidavit affirmed by the plaintiff on 21 May 2015 ("encl. 9");

(e) Affidavit in reply by the intervener affirmed by Karen Cheah Yee Lyn
G on 12 June 2015 ("the intervener's affidavit in reply") ("encl. 10");

(f) Affidavit in reply by the plaintiff in response to the affidavit of the intervener, affirmed on 18 June 2015 ("encl. 11");

(g) Affidavit in reply by the plaintiff in response to the affidavit of defendant, affirmed on 18 June 2015 ("encl. 12");

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(h) Affidavit in reply (2) by the intervener affirmed by Karen Cheah Yee Lyn on 9 July 2015 ("encl. 13");

(i) Further affidavit in reply by the plaintiff in response to the intervener's affidavit, affirmed on 24 July 2015 ("encl. 14");

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(j) Affidavit in reply (2) by the defendant affirmed on 2 September 2015 ("encl. 15"); and

(k) Further affidavit in reply by the plaintiff in response to the defendant's affidavit in reply 2, affirmed on 10 September 2015 ("encl. 16");

[4] By a notice of application dated 11 May 2015, the Bar Council of Malaysia applied for leave to intervene pursuant to s. 103E(6) of the Legal Profession Act 1976. Since both parties did not have objection to the said application, leave to intervene was granted on 14 May 2015.

Grounds Of Challenge

[5] The grounds to challenge the DC and subsequently the DB's orders were as summarised by the plaintiff in the plaintiff's written submission as follows:

(a) The order dated 12 March 2015 was a delayed and defective order and was nugatory, in that the DB's order was delivered to the plaintiff after one year and nine months after the legal action for the guardianship case had been commenced in court;

(b) The DB has acted *ultra vires* its jurisdiction to take in a family matter as a complaint on 15 April 2013 when there was an ongoing guardianship matter at the High Court of Shah Alam, and the divorce proceeding was concluded at the time of hearing of the DC on 10 September 2014;

(c) The plaintiff owed a duty to her client, Vijendran a/l Rajendiran, and the solicitor did not owe a duty of care, in law or ethics to the complainant who was an opponent in the civil suit, therefore, the disciplinary proceedings by DB against the plaintiff was wrong in procedure and done in bad faith;

(d) The DB did not take the material facts such as the guardianship of an unborn child into consideration when making the decision dated 12 March 2015 and the DC was negligent in conducting the hearing by assuming that the solicitor knew of the pre-wedding which has no relevance to the solicitor handling the guardianship case;

(e) The DC did not take proper evidence from the complainant who complained that the plaintiff went to the premises to embarrass the pregnant lady (defendant) who was nine months pregnant and waiting to deliver the child, before proceeding with the hearing on 10 September 2014; and

(f) The complaint made to DB by the defendant was a lie and an afterthought complaint done with bad faith and malice.

A **Background Facts**

[6] The background facts leading to this appeal could be stated as follows:

(a) The plaintiff is an advocate and solicitor representing her client, Vijendran a/l Rajendiran in an application for the legal guardianship of
B an unborn child in Suit No: 24-454-03-2013 at Shah Alam High Court, which was filed on 26 March 2013 with certificate of urgency;

(b) The OS was extracted by the plaintiff on 29 March 2013 with a return date stated therein as 3 April 2013;

C (c) The defendant complained to the Advocate and Solicitors Disciplinary Board (DB) that the plaintiff came to her house on 29 March 2013, at about 8.45pm, on the eve of her sister's wedding to serve the OS on the defendant;

(d) At that time, the defendant and her family were in the midst of a
D ceremony known as "Nalungu", a ceremony which would be performed the night before a wedding;

(e) The wedding in question was the defendant's sister's wedding which was set to be solemnised on 30 March 2013;

E (f) It was the defendant's complaint that the plaintiff had in a loud voice introduced herself as a lawyer by the name of S Shanti and who had come to the said premises to serve the summons;

(g) The defendant contended that the plaintiff chose to go to the defendant's house on the eve of the sister's wedding to serve the OS because she
F wanted to embarrass the defendant in front of her family members and friends who were gathered for the Nalungu ceremony;

(h) Hence, the DC was convened to inquire into the complaint, to ascertain whether the plaintiff's actions in serving the cause papers to the defendant on 29 March 2013 at about 8.45pm, on the eve of the
G defendant's sister wedding and at the time the ceremony was about to be conducted, was an unbecoming act of an advocate and solicitor;

(i) The DC found that there were merits in the complaint and recommended that a penalty in the form of a fine not exceeding RM5,000 to be imposed on the plaintiff;

H (j) The recommendation was accepted by the DB and the DB by order dated 12 March 2015 imposed a penalty of RM5,000 to be paid within one month, failing which the plaintiff shall be suspended from practice as advocate and solicitor until the penalty has been paid;

I (k) Dissatisfied with the order, the plaintiff filed the OS herein to challenge the same.

The Law

[7] In hearing this appeal, I was guided with the following well-established principles of law:

(a) In dealing with the appeal involving the decision of the Disciplinary Board of the Bar Council against a member of its own profession, the court had always held that, it is best for the legal profession entrusted with the supervision of advocates and solicitors to decide on the fate of its own members as members of the same profession ought to know and appraise better the conduct and the standard required of their members in the legal profession in the discharge of their duties and function as an advocate and solicitor;

(see *Trikkon Sdn Bhd v. Mahinder Singh Dulku* [2010] 5 CLJ 850; *Keith Sellar v. Lee Kwang Tennakoon* [1980] 1 LNS 36; [1980] 2 MLJ 191; *Gana Muthusamy v. Tetuan LM Ong & Co* [1998] 4 CLJ 878; [1998] 3 MLJ 341).

(b) It is only in rare and exceptional circumstances that the court would interfere with the discretion exercised by DB in a disciplinary decision involving an advocate and solicitor. Unless there were compelling reasons for the court to do so, the decision of the Disciplinary Board should not be interfered with. Otherwise, it would be the court and not the profession that would determine the yardstick of professional behaviour.

(see *Trikkon Sdn Bhd v. Mahinder Singh Dulku* [2010] 5 CLJ 850; *Bar Malaysia v. Mohd Fadli Shuib & Anor* [2014] 1 LNS 1934; *Gana Muthusamy v. Tetuan L M Ong & Co* [1998] 4 CLJ 878; [1998] 3 MLJ 341).

(c) It is well settled that the duty and responsibility to discipline members of the profession for conduct unbecoming is rooted in the public interest and it is the legal profession's duty to protect the public.

(see *Bar Malaysia v. Mohd Fadli Shuib & Anor* [2014] 1 LNS 1934)

Discussions Of The Issues And Findings Of The Court

[8] With the above-stated principles in mind, the court will scrutinise the complaint of the plaintiff to examine if there were merits in the complaint.

[9] It was not disputed that the DC had to enquire whether the plaintiff's actions in serving the cause papers to the defendant on 29 March 2013 at about 8.45pm, the night before the wedding of the defendant's sister and in the midst of a traditional ceremony, is an unbecoming of an advocate and solicitor.

[10] It has to be noted that the only explanation given by the plaintiff to this complaint is that the OS was filed on 26 March 2013 and was served on the defendant on 29 March 2013, to enable the defendant to attend the court on 3 April 2013. Since the time frame fixed for the return date in the OS is short, the plaintiff has to expedite the service of the OS on the defendant.

[11] After hearing the respective witnesses, the DC made the finding of fact as follows:

(a) The plaintiff was aware of the pre-wedding ceremony, since her client informed her about it and she had knowledge of her client's police report dated 26 February 2013;

(b) The plaintiff served the document on Friday night and she was fully aware that service of court documents after 4pm was deemed next day service and in which case, it would be considered served on Monday. Therefore, there was no real urgency for the document to be served in the manner it was done in this case;

(c) The plaintiff had caused embarrassment to the defendant;

(d) The plaintiff was aware that the defendant was in her advanced stage of pregnancy and the manner in which she carried out her duty would cause anxiety and emotional distress to the defendant and her family; and

(e) The plaintiff's mannerism during the hearing was not pleasant and also had shouted at the defendant to "shut up" with few outbursts even though the complainant and her father was calm throughout the hearing. (see the DC's report at exh. "SS1" of encl. 8 at p. 405).

[12] There was no reason for this court to disturb the finding of facts made by the DC since the plaintiff failed to demonstrate that those findings were perverse and unwarranted on the totality of the evidence before the DC. The DC had the benefit to observe the demeanour and heard the witnesses before coming to its conclusion.

[13] In this regard, the court refers to O. 62 r. 8 of the Rules of Court 2012 which states as follows:

> 8. Effect of service after certain hours (O. 62 r. 8)
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> Any document (other than a writ of summons or other originating process) service of which is effected under rule 3 or under rule 6(1)(a) *after twelve noon on a day preceding the weekly holiday or after four in the afternoon on any other weekdays,* shall, for the purpose of computing any period of time after service of that document, *be deemed to have been served on the day following that day preceding the weekly holiday or on the day following that other weekday,* as the case may be. (emphasis added)

[14] Reference was also made to Practice Note No.1 of 1968 on substituted service which requires service attempts to be made on weekdays and at reasonable hours.

[15] Taking into account the above-mentioned provisions, there was no plausible explanation for the plaintiff to effect the service of the cause paper at approximately 8.45 at night on a Friday, since the service would be deemed to be done on Monday. It is unbecoming for the plaintiff to serve the cause papers on a Friday night, with the knowledge that, that was the eve of the wedding of the defendant's sister and the defendant would be surrounded with family members and friends.

[16] The court would also add that the return date stated in the OS at Shah Alam High Court was merely a case management date as could be seen from the endorsement at the top left of the OS. (See p. 47 of the appeal record at encl. 8). Therefore, there is no urgency for the plaintiff to serve the cause papers as contended, and the plaintiff could even obtain another date if she could not serve the papers within time.

[17] Further, the court would also add, instead of addressing the complaint against the plaintiff, the plaintiff was making various accusations against the defendant which were personal in nature and it would appear that the plaintiff was handling her client's case as if it was her own personal matter. This could be gleaned from the excerpts of para. 7 of encl. 9 as follows:

> Sekiranya anakguam saya seorang pendera, mengapakah pengadu/Defendan hidup bersama anakguam saya sehingga 18.1.2013. Semua laporan polis Pengadu/Defendan adalah bertujuan untuk menghalang anakguam saya daripada menjumpai anak kandungan dan tujuan Defendan untuk menyeronok dengan agenda tersiratnya.
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> Pada tahun 2015 agenda tersiratnya terkecai … dimana Defendan melakukan cinta tiga-segi dengan seorang lelaki bernama Arumugam. Ini menunjukkan perangai Defendan yang tidak bermoral dan tidak bermoral dibawa satu perkahwinan sehingga mengadakan hubungan cinta tiga-segi … tetapi pada masa yang sama Pengadu/Defendan mengalu-alukan abang iparnya menyatakan anak Lavanyaa sebagai anak abang iparnya dan mengalu-alukan seorang lelaki bernama Arumugam menyatakan anak Lavanyaa sebagai anak Arumugam.

[18] At p. 19 of the appeal record annexed to encl. 8, the plaintiff had stated as follows:

> … if the application was not filed on 26.3.2013 and served on her on an urgent basis and the matter brought before the court, there was a strong possibility that the child now known as Lavanyaa a/p Vijendran being a "bastard child" with no father's name …

[19] All these allegations appeared to be personal accusations and contrary to r. 32 of the Legal Profession (Practice and Etiquette) Rules 1978 which provides that "the feeling existing between clients shall not be allowed to influence counsel in their conduct and demeanour towards each other or towards parties and their witnesses in the case".

[20] The court is also of the opinion that the argument by the plaintiff that the DC/DB had acted *ultra vires* the DC and DB's jurisdiction to take a family matter as a complaint when there was an ongoing guardianship matter at the Shah Alam High Court at the time of the complaint on 15 August 2013 was totally misconceived. The complaint by the defendant to the DB has nothing to do with the issues regarding guardianship between the defendant and her husband, but with regards to the conduct of the plaintiff as the solicitor representing the husband towards the defendant, particularly on the manner and timing the plaintiff chose to serve the cause papers on the defendant.

[21] The plaintiff had also contended that the DB did not take into account the material facts regarding the guardianship of an unborn child when delivering the decision on 12 March 2015. As illustrated in the preceding paragraph, whether or not the High Court had decided the guardianship tussle between the defendant and her husband had nothing to do with the complaint made to the DB. The DC could not look beyond the terms of the power vested in it, ie, to inquire into the complaint made (see *Rajehgopal Velu v. Ganashalingam Rajah; Majlis Peguam Malaysia (Intervener)* [2015] 8 CLJ 1202 and *Bar Malaysia v. Neasarani T Singara Thevar & Anor* [2015] 8 CLJ 634).

[22] With regard to the plaintiff's submission that the litigation involving the defendant in the guardianship of the child was concluded on 18 June 2013 and 9 September 2014, whereas the order of DB was dated 12 March 2015, and hence the order is delayed and defective, this line of contention was misconceived. The court would again reiterate that the proceedings with regards to guardianship had nothing to do with the complaint made by the defendant against the plaintiff. The real issue was not with regards to whether proper service had been effected against the defendant, but rather the manner the plaintiff had conducted herself as a solicitor in serving the cause papers. Though the court does not condone delays in delivering DB's decision, the court found that nothing in the said order which was defective for the same to be set aside.

Conclusion

[23] Having considered the cause papers filed herein and having heard the arguments by the respective learned counsel for the plaintiff, the intervener as well as the defendant and having given the matter a very careful and serious consideration, accordingly I dismissed the plaintiff's OS with costs of RM3,000 to be paid to the defendant and the intervener respectively.